

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TROY X. KELLEY,

Defendant.

Case No. 3:15-cr-05198-RBL

DECLARATION OF ANGELO J.
CALFO IN SUPPORT OF
DEFENDANT'S RULE 29 MOTION
FOR ACQUITTAL FOLLOWING
DISCHARGE OF JURY

**NOTED FOR:
MONDAY, JUNE 20, 2016
(ORAL ARGUMENT REQUESTED)**

I, Angelo J. Calfo, declare as follows:

1. I am a partner with Calfo Harrigan Leyh & Eakes LLP ("CHLE"), the law firm representing Mr. Kelley in this prosecution.

2. Attached as Exhibit A is a true and correct copy of excerpts of the rough transcript of Mark Schedler's testimony, dated April 13, 2016.

3. Attached as Exhibit B is a true and correct copy of excerpts of the rough transcript of Julie Yates's testimony, dated March 16, 2016.

4. Attached as Exhibit C is a true and correct copy of excerpts of the rough transcript of Patricia LeVeck's testimony, dated March 23, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Andrew C. Friedman andrew.friedman@usdoj.gov

Arlen R. Storm arlen.storm@usdoj.gov

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Richard E. Cohen richard.e.cohen@usdoj.gov

s/Susie Clifford

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,) No. CR15-5198RBL
)
vs.) ROUGH DRAFT
)
TROY KELLEY,)
)
Defendant.)

TESTIMONY OF MARK SCHEDLER

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

April 13, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
Arlen Storm
Assistant United States Attorneys
Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

1 just explain to the jury what this settlement statement
2 section means on the closing agreement and the escrow
3 instructions?

4 A. Well, it is telling us that the escrow agent,
5 Fidelity, is going to prepare a settlement statement, and
6 what the borrower should know about some of the items that
7 are shown there. If I may, I would like to look at each
8 sentence.

9 Q. Yes.

10 A. Here we see the authority and the instructions to
11 prepare a settlement statement showing the funds that are
12 deposited and how the disbursement of those funds are
13 going to take place, and no disbursement will be done that
14 isn't approved in advance by the signing of the settlement
15 statement, by the borrower in this case. And it tells the
16 borrower some items may be estimated, and the final amount
17 of each estimated item will be adjusted to the exact
18 amount required to be paid at the time of disbursement.

19 It shows again why there is a final settlement
20 statement later on. And it is referring to items on the
21 settlement statement that are not fees but are estimated
22 amounts. They would be noted typically as estimated.

23 Q. And we are going to look at another settlement
24 statement in just a second. But can you just explain to
25 the jury, is it significant from your perspective,

1 practicing in the real estate area, whether something is
2 listed as a fee or whether something is listed as a
3 deposit?

4 A. Yes.

5 Q. And why?

6 A. Well, one big reason is it tells you who owns that
7 money after closing. A fee is owned by the recipient of
8 the fee when it is paid. Now, there may be services owed,
9 but it is not the borrower's money anymore.

10 A deposit is a borrower's money until it begins to get
11 earned. And as it is earned it changes -- that part that
12 is earned changes ownership to the service provider, or
13 the cost that was paid, or whatever it is. So the
14 critical difference, to me, between a fee and a deposit is
15 who owns the money.

16 Q. And does that change things for the escrow company,
17 whether something is a fee or a deposit, in terms of what
18 their duties and responsibilities are?

19 A. Absolutely. Because if the escrow company or the
20 escrow agent is indicating that they are taking at the
21 time of closing a deposit that they are going to continue
22 to hold for some service, it means the relationship
23 between escrow and the borrower is going to continue after
24 the closing. Those fiduciary duties related to that
25 deposit are going to continue after closing, and that

escrow agent is going to provide an accounting, and have those duties.

Q. So from an escrow perspective, if something that is listed on the settlement statement is in fact a deposit, is it important or would you expect it to be designated in some way as being either estimated or as a deposit as opposed to it being a fee?

A. I would definitely expect it to be noted to -- as part of that due that fiduciary duty to the borrower that says this is your money, I am going to be holding your money.

Q. So is it fair to say that you don't see things listed on a HUD-1 statement that are listed as a fee or a cost that is being disbursed, and yet somehow it really remains the borrower's money?

A. No.

Q. Let's go to --

A. That wouldn't the standard of care.

Q. And what do you mean by that, "wouldn't be the standard of care"?

A. The standard of care is the generally recognized way -- the right way to do things in a particular profession. And a lot of what I do as an expert witness for brokers and lawyers is talk about those standards of care. That's what I mean by standard of care.

11:50:24AM 1 talking about in terms of whether something is a deposit
11:50:27AM 2 versus whether or not it is a straight fee?

11:50:29AM 3 A. Yes. I see in Line 508, which reads to me as,
11:50:36AM 4 "Estimated final utility bill to Seattle Public
11:50:41AM 5 Utilities." And following that, in 509, "estimated final"
11:50:47AM 6 something "to Seattle City Light.

11:50:49AM 7 Q. "Light bill," I think it says.

11:50:52AM 8 A. Okay.

11:50:53AM 9 Q. Is that what you mean by whether something is a
11:50:57AM 10 deposit as opposed to it being a fee?

11:50:59AM 11 A. Yes.

11:51:00AM 12 Q. And what about the Hs that we see indicated here,
11:51:04AM 13 both at 506, which is the tax payment, as well as 508 and
11:51:08AM 14 509? What do those signify?

11:51:13AM 15 A. It could be hold-back, which is another kind of a
11:51:15AM 16 deposit.

11:51:16AM 17 Q. And have you seen that used before to indicate,
11:51:19AM 18 again, that they are continuing to hold money that belongs
11:51:22AM 19 to --

11:51:23AM 20 A. I see it occasionally. It is not a common practice.
11:51:26AM 21 The more common practice would be this "Est," period, that
11:51:30AM 22 begins at Lines 508 and 509.

11:51:33AM 23 Q. And then if we look at 507, this is where it says,
11:51:39AM 24 "Reconveyance fee to the Post Closing Department." There
11:51:41AM 25 is no estimated or H next to that. What does that signify

11:51:45AM 1 to you, and what does it mean in the industry if it is
11:51:47AM 2 listed that way on a HUD-1?

11:51:50AM 3 A. That it is being paid to the Post Closing Department,
11:51:52AM 4 and it will be the Post Closing Department's money when it
11:51:57AM 5 is paid.

11:51:58AM 6 Q. So it is a fee as opposed to the borrower's money?

11:52:02AM 7 A. Just as it says, a fee. As we saw with the
11:52:04AM 8 earlier -- this is a combined -- two of the columns we
11:52:07AM 9 looked at earlier, it is not only to whom it was paid but
11:52:11AM 10 for what purpose, the reconveyance fee.

11:52:13AM 11 Q. If we could back out and go to Page 7 of this
11:52:18AM 12 document. Because this is Old Republic, I just want to
11:52:24AM 13 look at the settlement instructions. If you could
11:52:26AM 14 highlight the top, please, the supplement. So this is a
11:52:32AM 15 set of settlement instructions -- or escrow instructions
11:52:35AM 16 in the closing agreement for Old Republic; is that right?

11:52:38AM 17 A. Yes.

11:52:38AM 18 Q. If we could highlight the paragraph down below that
11:52:41AM 19 says, "Settlement statement approved." Again, is this
11:52:50AM 20 similar language to what we just went through with
11:52:52AM 21 Fidelity?

11:52:52AM 22 A. Yes, it is.

11:52:53AM 23 Q. And the same setup in terms of whether or not
11:52:55AM 24 something is estimated, it would be indicated on the
11:52:58AM 25 HUD-1?

02:19:29PM 1 Q. Are you aware that Julie Yates testified that when
02:19:32PM 2 she went to Chicago Title they continued to operate that
02:19:34PM 3 way?

02:19:34PM 4 A. I think her testimony was that Chicago Title didn't
02:19:38PM 5 even track reconveyances.

02:19:40PM 6 Q. Are you aware that Carl Lago testified that at Old
02:19:45PM 7 Republic Title they took in the larger amount and refunded
02:19:52PM 8 the money they did not need?

02:19:54PM 9 A. Yes.

02:19:54PM 10 Q. And those title companies, they were perfectly
02:20:00PM 11 entitled to do that, right?

02:20:01PM 12 A. Yes, they were.

02:20:02PM 13 Q. Because that is their business model?

02:20:04PM 14 A. They think it is.

02:20:06PM 15 Q. You talked about Exhibit A108. I want to show you
02:20:30PM 16 Page 2 of that exhibit. Down at the bottom there are some
02:20:38PM 17 fees. There is a wire service fee to Old Republic. And
02:20:42PM 18 down there there is a delivery courier service fee right
02:20:46PM 19 below that for \$27.60. Now, just because there is no E
02:20:52PM 20 next to delivery courier service, the courier company
02:20:57PM 21 can't take that \$27 and just abscond with it, never having
02:21:01PM 22 intended to deliver anything, right?

02:21:04PM 23 A. I assume so. Yeah, I agree with you.

02:21:07PM 24 Q. That makes sense, right?

02:21:08PM 25 A. That makes sense.

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. CR15-5198RBL
)	
vs.)	
)	JULIE YATES
TROY KELLEY,)	
)	
Defendant.)	

ROUGH DRAFT

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

March 16, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
Arlen Storm
Assistant United States Attorneys
Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

04:16:50PM 1 A. Not necessarily, in my opinion.

04:16:53PM 2 Q. Certainly you would have something that indicated he
04:16:56PM 3 was doing that work, wouldn't you?

04:16:59PM 4 A. Yes. There was correspondence back and forth and
04:17:03PM 5 some phone calls.

04:17:03PM 6 Q. And, again, you don't have any of that correspondence
04:17:06PM 7 or emails or agreement with respect to how the work was
04:17:09PM 8 going to change, because you don't have any of your
04:17:12PM 9 documents; is that fair?

04:17:13PM 10 A. That's right.

04:17:14PM 11 Q. Now, you are familiar with HUD-1 documents, are you
04:17:25PM 12 not?

04:17:25PM 13 A. Yes.

04:17:25PM 14 Q. And you understand that there is a difference on a
04:17:28PM 15 HUD-1 between listing something as an estimated fee or
04:17:32PM 16 listing something as a fee; is that fair?

04:17:34PM 17 A. There are a few estimates that are used on HUD-1s.

04:17:42PM 18 Q. And you would agree that the reconveyance fee that
04:17:45PM 19 was paid to PCD was never listed as an estimated fee on
04:17:48PM 20 the HUD-1, was it?

04:17:49PM 21 A. It would not have been.

04:17:51PM 22 Q. But there were in fact other fees that can be listed
04:17:53PM 23 and were listed on a HUD-1 as an estimated fee, correct?

04:17:57PM 24 A. Not really fees. Closing costs. There are some
04:18:05PM 25 items that are estimated. Would you like me to give you

EXHIBIT C

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1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF WASHINGTON
 3 AT TACOMA

4 UNITED STATES OF AMERICA, }
 5 Pl a i n t i f f, }
 6 vs. }
 7 TROY X. KELLEY, }
 8 Defendant. }
 9 }
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 12 }
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 16 }
 17 }
 18 }
 19 }
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 21 }
 22 }
 23 }
 24 }
 25 }
 Docket No. CR15-5198RBL
 Tacoma, Washington
 March 23, 2016
 JURY TRIAL DAY 7

10 TESTIMONY OF PATRICIA LeVECK - CONTINUED
 11 TESTIMONY OF ERICA CALDERAS
 12 BEFORE THE HONORABLE RONALD B. LEIGHTON
 13 UNITED STATES DISTRICT COURT JUDGE, and a jury

13 APPEARANCES:

14 For the Pl a i n t i f f: ANDREW C. FRIEDMAN
 15 KATHERYN K. FRIERSON
 16 ARLEN R. STORM
 17 Assistant United States Attorneys
 18 700 Stewart Street, Suite 5220
 19 Seattle, Washington 98101-1271

18 For the Defendant: ANGELO J. CALFO
 19 PATRICIA A. EAKES
 20 Calfo Harrigan Leyh & Eakes, LLP
 21 999 3rd Avenue, Suite 4400
 22 Seattle, Washington 98104

21 Court Reporter: Teri Hendrix
 22 Union Station Courthouse, Rm 3130
 23 1717 Pacific Avenue
 24 Tacoma, Washington 98402
 25 (253) 882-3831

25 Proceedings recorded by mechanical stenography, transcript
 produced by Reporter on computer.

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1 items, do you see that?

2 A. I do.

3 Q. One of the reductions is for a real estate tax payment, do
4 you see that?

5 A. Yes.

6 Q. Do you see the H next to that ma'am?

7 A. Yes.

8 Q. That indicates it's a hold-back?

9 A. Yes.

10 Q. That means the customer is being advised there may be a
11 return of refunds relating to that item?

12 A. Yes.

13 Q. And similarly there are hold-backs even noted on lines
14 508, 509, estimated final utility bill to Seattle Public
15 Utilities, estimated final light bill to Seattle City Light;
16 do you see that?

17 A. Yes.

18 Q. It's specifically listed on the HUD as an estimated item,
19 correct?

20 A. Yes.

21 Q. There's an H there which would tell the customer that this
22 item was related to funds that Old Republic would refund or
23 return in the event they were not needed correct?

24 A. Yes, because we were holding them back in the escrow.

25 Q. Exactly. If it turn out the customer was owed money you

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1 would take that money out of escrow and refund it to the
2 customer, correct?

3 A. Yes.

4 Q. Now, the 507 is listed as a reconveyance fee to the Post
5 Closing Department in the amount of \$300 do you see that?

6 A. Yes, I do.

7 Q. And that is the language that Old Republic chose to use in
8 describing the fee that went to the Post Closing Department
9 right?

10 A. It wasn't the language, it was the language that this
11 closer chose to use.

12 Q. And the closer would be somebody employed by you, right?

13 A. Yes.

14 Q. So let me ask again that language used on the settlement
15 statement, reconveyance fee to the Post Closing Department was
16 chosen by Old Republic in terms of describing it to the
17 customer, correct?

18 A. Yes.

19 Q. Now, if we could come back out from this section please.
20 Now, at a typical closing, there is a settlement statement and
21 accompanying that document are escrow instructions, correct?

22 A. Yes.

23 Q. If we could go, proceed down through here to this sex
24 here.

25 These are escrow instructions related to the Jager

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1 right?

2 A. Yes.

3 Q. And they would say I am promised that I will never claim
4 there is a verbal agreement related to these escrow
5 instructions, right?

6 A. Yes.

7 Q. And again, Mr. Kelley had nothing to do with the
8 preparation of those escrow instructions, did he?

9 A. No.

10 Q. That was done by escrow employees at Old Republic, right?

11 A. Yes.

12 Q. When the money came into escrow from Old Republic it was
13 money that came in from the lender?

14 A. Usually yes.

15 Q. If it didn't come in from the lender it came in from the
16 person who was purchasing the property, correct?

17 A. Yes.

18 Q. That money was not Old Republic's money, was it?

19 A. No, it was not.

20 Q. The money was either the lender's money or the owner's
21 money, right?

22 A. Correct.

23 Q. But the only things you guys did as Old Republic was
24 exactly what the escrow customer told you to do, right?

25 A. Yes.

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1 Q. And in the McFerrin litigation ma'am, isn't it the case
2 that in order to fend off the class action lawyers, Old
3 Republic told federal judges that the fee that was on the
4 closing statement was plainly disclosed to the customer and
5 that the customer agreed to pay it?

6 A. Yes.

7 Q. When you were deposed in the McFerrin litigation you were
8 asked about reconveyance processing fees and you characterized
9 them as fees paid to a vendor corrected?

10 A. Yes.

11 MR. CALFO: If I could have just a moment Your Honor.

12 THE COURT: Certainly.

13 BY MR. CALFO:

14 Q. Now, in the McFerrin litigation, one of the things that
15 Old Republic wanted to demonstrate was how complicated a
16 reconveyance could be, correct?

17 A. Well, I think they wanted to point out the steps sometimes
18 that needed to be taken yes.

19 Q. Didn't you say in declarations that completing a
20 reconveyance is simple in theory and can be frequently slow
21 and complicated in reality?

22 A. At times, yes.

23 Q. Is that what you said in McFerrin litigation about
24 reconveyance processing?

25 A. I would have to look at that once again to be sure I said

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1 Q. That's a problem for your customer, isn't it?

2 A. Yes.

3 Q. It can prevent future sales or refinances?

4 A. Yes.

5 Q. Because no one is going to loan money on a property again
6 if they see there's a large lien or a lien on the property
7 that hasn't been taken care of, correct?

8 A. Yes.

9 Q. And it results on in a cloud on the borrower's or the
10 seller's title?

11 A. Yes.

12 Q. So bottom line this reconveyance processing work is a
13 valuable service to your customers, right?

14 A. Yes.

15 Q. At Old Republic and when an Old Republic customer pays the
16 fee for a service they are getting a valuable, something
17 valuable in exchange are they not?

18 A. Yes.

19 Q. Now, during your testimony yesterday, you mentioned the
20 fact that there was a fire at the Stewart Title offices in
21 Everett correct?

22 A. Yes.

23 Q. And you knew about the Stewart Everett offices in Everett
24 before the fire?

25 A. For PCD being there?

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,) No. CR15-5198RBL
)
vs.)
) ROUGH DRAFT
TROY KELLEY,)
)
Defendant.)

CROSS-EXAMINATION OF SCOTT SMITH

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

March 29, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
Arlen Storm
Assistant United States Attorneys
Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

02:30:39PM 1 THE WITNESS: I do not recall.

02:30:47PM 2 By Mr. Calfo:

02:30:49PM 3 Q. If we could go to Page 9 of the summary judgment
02:30:52PM 4 motion, please. If we could look at Lines 9 through 20,
02:31:02PM 5 please. Now, in this section of the summary judgment
02:31:09PM 6 motion you were describing the transaction between
02:31:12PM 7 McFerrin -- the McFerrin plaintiffs and Old Republic. Do
02:31:16PM 8 you see that?

02:31:16PM 9 A. I'm sorry. I was doing what? I was reading it when
02:31:24PM 10 you asked me.

02:31:25PM 11 Q. You are describing the transaction between the
02:31:28PM 12 McFerrins, Old Republic's escrow customers, and Old
02:31:34PM 13 Republic. Do you see that?

02:31:35PM 14 A. Yes.

02:31:35PM 15 Q. And you wanted to make a point in this motion for
02:31:37PM 16 summary judgment that the McFerrins had had the
02:31:41PM 17 opportunity to read the instructions and the settlement
02:31:43PM 18 statement before they decided to go forward with the
02:31:47PM 19 closing, correct?

02:31:49PM 20 A. Yes.

02:31:50PM 21 Q. And as a part of that effort you pulled out a section
02:31:55PM 22 of the escrow instructions in which the customer
02:31:59PM 23 specifically approves paying the costs, expenses and other
02:32:03PM 24 obligations itemized on the statement. Do you see that?

02:32:07PM 25 A. Yes.

02:32:07PM 1 Q. I am looking at Lines 15 through 17.

02:32:12PM 2 A. Yes.

02:32:13PM 3 Q. You believed that was an important point to make in
02:32:18PM 4 your effort to try to get Old Republic dismissed from the
02:32:20PM 5 litigation; is that true?

02:32:22PM 6 A. On the contract claim.

02:32:24PM 7 Q. So the answer is "yes," sir?

02:32:26PM 8 A. On the contract claim, yes.

02:32:28PM 9 Q. Can we go to the next page, please? If we could
02:32:35PM 10 highlight the first half of the document. In the motion
02:32:42PM 11 papers here, at Page 10 of the motion papers, you note in
02:32:49PM 12 the second sentence of this paragraph we are looking at,
02:32:52PM 13 which is at Lines 2 and 3, that the statement provided for
02:32:57PM 14 a separate \$100 fee for reconveyance processing, on
02:33:01PM 15 Line 105. Do you see that?

02:33:04PM 16 A. Yes.

02:33:04PM 17 Q. And then your firm took a picture of the settlement
02:33:07PM 18 statement to show that it was listed on the settlement
02:33:12PM 19 statement at 105 of the HUD statement as reconveyance
02:33:17PM 20 processing. Do you see that?

02:33:18PM 21 A. Yes.

02:33:18PM 22 Q. And you wrote below that, starting at Line 8 of
02:33:24PM 23 Page 10, "The McFerrins admit knowing a separate
02:33:29PM 24 reconveyance fee was being collected in their transaction,
02:33:31PM 25 and that they agreed to pay it." Do you see that?

02:33:33PM 1 A. Yes.

02:33:37PM 2 Q. If we could go down to Lines 14 through 21, please.

02:33:53PM 3 Again, as a part of your effort to get the case dismissed
02:33:56PM 4 on the contract claim, you were making the point that the
02:33:58PM 5 McFerrins had refinanced on previous occasions, and had
02:34:03PM 6 paid reconveyance fees on previous occasions, and had no
02:34:06PM 7 questions or concerns about them. Do you see that?

02:34:11PM 8 That's one of the arguments that was made at Lines 14
02:34:13PM 9 through 16?

02:34:14PM 10 A. Yes.

02:34:14PM 11 Q. If we could go to Page 11. Now, with respect to the
02:34:28PM 12 Jagers' sales transaction, you essentially made the same
02:34:33PM 13 series of points; is that right?

02:34:34PM 14 A. I would have to read it, but I probably did.

02:34:37PM 15 Q. If we could go down to Lines 15 through 26, please.
02:34:43PM 16 Here on Page 11 of your motion for summary judgment you
02:34:50PM 17 took a picture of the reductions in amount due to seller
02:34:53PM 18 on the Jagers' settlement statement. Do you see that?

02:34:56PM 19 A. Yes.

02:34:56PM 20 Q. And on there you made the point in your motion, at
02:35:02PM 21 Line 507 on the settlement statement, that there was a
02:35:05PM 22 reconveyance fee to the Post Closing Department in the
02:35:07PM 23 amount of \$300. Do you see that?

02:35:10PM 24 A. Yes.

02:35:13PM 25 Q. And you can see looking at that that it is not listed

02:35:15PM 1 as an estimated item; is that right?

02:35:16PM 2 A. Correct.

02:35:17PM 3 Q. But there are, on Lines 508 and 509, estimated items
02:35:22PM 4 that are listed; is that right?

02:35:23PM 5 A. Yes.

02:35:23PM 6 Q. Now, if we could go to Page 18, please, Lines 7
02:35:34PM 7 through 11. In your motion, at Lines 7 through 11 on
02:35:49PM 8 Page 18, you further make the point that plaintiffs --
02:35:51PM 9 Which are Old Republic's escrow customers, right?

02:35:55PM 10 A. Well, the two couples in this particular lawsuit.

02:35:57PM 11 Q. Were Old Republic's escrow customers, right?

02:36:01PM 12 A. Were customers, yes.

02:36:02PM 13 Q. "Plaintiffs are bound by the language of the
02:36:06PM 14 unambiguous escrow contracts that they signed and the
02:36:09PM 15 charges they expressly agreed to pay." Do you see that?

02:36:13PM 16 A. Yes.

02:36:13PM 17 Q. Now, if we could look at Exhibit --

02:36:32PM 18 I think this may be a duplicate, your Honor. I have
02:36:35PM 19 it listed as A800.

02:36:41PM 20 THE COURT: A what?

02:36:46PM 21 MR. CALFO: A800. Your Honor, can I use the
02:37:04PM 22 screen for this exhibit?

02:37:05PM 23 THE COURT: Sure. What is the name of the
02:37:07PM 24 document?

02:37:07PM 25 MR. CALFO: "Order Granting Defendant's Motion For

EXHIBIT E

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 UNITED STATES OF AMERICA,) Docket No. CR15-5198RBL
5 Plaintiff,) Tacoma, Washington
6 vs.) March 24, 2016
7 TROY X. KELLEY,)
8 Defendant.) JURY TRIAL DAY 8

9
10 TESTIMONY OF ERICA CALDERAS - CONTINUED
11 BEFORE THE HONORABLE RONALD B. LEIGHTON
12 UNITED STATES DISTRICT COURT JUDGE, and a jury

13 APPEARANCES:

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15 KATHERYN K. FRIERSON
16 ARLEN R. STORM
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24 Proceedings recorded by mechanical stenography, transcript
25 produced by Reporter on computer.

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1 Q. Did you tell the Court in the document that Ms. Sutherland
2 did not receive a refund for her fees -- of any portion of the
3 fees?

4 A. Is there a line item?

5 Q. You can read the section that starts on page 12. It goes
6 to page 14.

7 A. So I don't see that it says one way or another about a
8 refund.

9 Q. If we could go to page 14 and blow up the section that
10 says "D Post Closing Department." Again, this is related to
11 Ms. Sutherland, correct?

12 A. Yes.

13 Q. What you said to the Court about Ms. Sutherland in this
14 section was that Fidelity received a report from PCD showing
15 that PCD tracked the NCB Deed of Trust and it had been
16 reconveyed, do you see that?

17 A. Yes.

18 Q. It says, "Fidelity heard nothing further from Sutherland
19 until this lawsuit. Sutherland had not sought any refund from
20 PCD. She has no information to dispute that PCD performed a
21 service to earn the \$135 fee." Correct?

22 A. Correct.

23 Q. And that's what you represented to the Court about the
24 fact that that fee had been earned, the \$135, correct?

25 A. We told the Court that the plaintiff had no information to

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1 dispute that PCD performed a service to earn the \$135 fee. We
2 did not take a position that PCD earned the \$135 fee. It says
3 what it says.

4 Q. All right. And you actually did take Ms. Sutherland's
5 deposition?

6 A. I did. Well, my partner did, I believe.

7 Q. We can see here in the brief that you are citing to a
8 piece of the record related to that statement that you just
9 made that she has no information to dispute that PCD performed
10 a service to earn the \$135 fee, do you see that?

11 A. I do.

12 Q. Let's take a look at A-719.

13 MS. EAKES: May I approach?

14 THE COURT: Yes.

15 BY MS. EAKES:

16 Q. Now, Exhibit A-719 is Exhibit 19 to the declaration. I
17 will represent to you that this is a portion of the citation
18 that you have in the record from that brief at 88, at 7
19 through 21, do you see that?

20 A. I am finding it. Deposition page 88?

21 Q. It's actually deposition page 89. You said a moment ago
22 that your partner, Mr. Fogarty, is the person who actually
23 took Ms. Sutherland's deposition; is that right?

24 A. That's right.

25 Q. If we could turn to page -- I am sorry, I will offer

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1 performed even when the lender charges for reconveyance
2 services," right?

3 A. Cited their very own Complaint for that, yes.

4 Q. You also said, "Thus, while plaintiffs made a fee to PCD,
5 they received a service in exchange and thus were not harmed";
6 is that right?

7 A. That's correct.

8 Q. Now, if we scroll down, there's a footnote at the bottom
9 of the page, and just so the footnote makes sense, if you can
10 go up to the top where it says "second" and go down to line 8,
11 please, from the top to line 8.

12 So you see that there's a citation to footnote No. 4 here;
13 is that right?

14 A. Yes, I see it, but let me read this sentence. Yes.

15 Q. So what you said in this section, assuming arguendo that
16 there was a duty to disclose, defendant satisfied any such
17 duty by disclosing. With respect to the reconveyance fee,
18 plaintiffs admit that the fee was initially -- was indeed
19 disclosed, that they knew by the closing that their lenders
20 had charged for reconveyance services, the plaintiffs agreed
21 to the payment of all fees listed on the HUD-1 and plaintiffs
22 directed payment to PCD, and then you have footnote 4?

23 A. Yes.

24 Q. Do you see that? If we could go down to footnote 4. It
25 says, "Even if PCD were not a third-party, defendants would

EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. CR15-5198RBL
)	
vs.)	TESTIMONY OF JULIE YATES
)	& CARLTON LAGO
TROY KELLEY,)	
)	
Defendant.)	

ROUGH DRAFT

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

March 17, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
Arlen Storm
Assistant United States Attorneys
Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

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10:20:55AM 1 with getting fees lower because the fees were passed on to
10:20:58AM 2 the consumer. They didn't affect the bottom line."

10:21:02AM 3 A. Yes.

10:21:02AM 4 Q. Did you say that?

10:21:03AM 5 A. Yes.

10:21:03AM 6 Q. In fact, Fidelity wasn't out any money with respect
10:21:06AM 7 to the reconveyance fees, correct?

10:21:08AM 8 A. That's correct.

10:21:09AM 9 Q. That was the borrower's money, it wasn't Fidelity's
10:21:12AM 10 money that was being paid to PCD, correct?

10:21:14AM 11 A. That's correct.

10:21:14AM 12 Q. And Fidelity didn't have any ownership interest in
10:21:16AM 13 that money, correct?

10:21:17AM 14 A. Not in that \$15, no.

10:21:19AM 15 Q. They didn't have an ownership interest in any of the
10:21:22AM 16 money that was being paid to PCD, correct?

10:21:26AM 17 A. I don't understand what you mean by "ownership."

10:21:29AM 18 Q. It wasn't Fidelity's money, whether it was \$405 or it
10:21:34AM 19 was \$15? It wasn't Fidelity's money, correct?

10:21:38AM 20 A. That's correct. It is always the borrower's money.

10:21:41AM 21 Q. No matter what the amount was that was paid to
10:21:44AM 22 Mr. Kelley, correct?

10:21:44AM 23 A. For all the fees associated with the closing, yes.

10:21:55AM 24 MS. EAKES: That's all I have. Thank you.

10:21:57AM 25 THE COURT: Redirect.

EXHIBIT G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. CR15-5198RBL
)	
vs.)	TESTIMONY OF JULIE YATES
)	& CARLTON LAGO
TROY KELLEY,)	
)	
Defendant.)	

ROUGH DRAFT

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

March 17, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
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Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

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11:32:26AM 1 and there was no trustee fee charged, the lender delivered
11:32:31AM 2 the deed of reconveyance without a demand for payment of
11:32:35AM 3 the trustee fee.

11:32:40AM 4 Q. When the trustee doesn't do the deed of reconveyance,
11:32:51AM 5 and the lender does it, which is one of the reasons you
11:32:55AM 6 just said fees can go undisbursed, what does Old Republic
11:32:59AM 7 Title do with those unused or undisbursed trustee fees?

11:33:04AM 8 A. They hold them pursuant to the escrow instructions,
11:33:07AM 9 waiting for the demand to disburse them with the delivery
11:33:15AM 10 of the, reconveyance, if that is the case. If they are
11:33:22AM 11 undisbursed after a certain period of time they are
11:33:26AM 12 sheeted to the state of Washington pursuant to the
11:33:28AM 13 Washington codes.

11:33:33AM 14 Q. Let's talk about the first one. You return to the
11:33:39AM 15 borrower; is that correct?

11:33:39AM 16 A. If the deed of reconveyance is delivered without a
11:33:43AM 17 trustee fee payment required, then the funds are then
11:33:49AM 18 returned to the party who deposited them, either the
11:33:52AM 19 borrower or the seller.

11:33:53AM 20 Q. And what if you try to find the borrower or the
11:33:57AM 21 seller and can't, is that when the sheet comes in?

11:34:00AM 22 A. Yes.

11:34:01AM 23 Q. Why not just keep them? Why not just --

11:34:06AM 24 A. It is not the company's money. It is the money of
11:34:10AM 25 the borrower or the seller.

EXHIBIT H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,) No. CR15-5198RBL
)
vs.) ROUGH DRAFT
)
TROY KELLEY,)
)
Defendant.)

REBUTTAL CLOSING ARGUMENT

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

April 20, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
Arlen Storm
Assistant United States Attorneys
Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

03:50:05PM 1 THE COURT: Thank you, Mr. Calfo.

03:50:10PM 2 Mr. Friedman, you have 22 minutes. Please turn your
03:50:14PM 3 attention to Mr. Friedman, who will make his final
03:50:17PM 4 rebuttal on behalf of the government.

03:50:19PM 5 MR. FRIEDMAN: Thank you, your Honor. Ladies and
03:50:23PM 6 gentlemen, it has been a long trial. We are 22 minutes
03:50:27PM 7 away.

03:50:27PM 8 It seems counterintuitive given how much testimony,
03:50:31PM 9 how many witnesses you have heard, but at heart this is a
03:50:33PM 10 pretty simple trial. It is a simple case. Mr. Kelley
03:50:37PM 11 lied to escrow companies to get them to give him millions
03:50:41PM 12 of dollars of borrowers' money. He promised he would
03:50:45PM 13 refund it, he didn't. He pocketed it. He stole it. He
03:50:49PM 14 lied to get that money and he kept it. And that's fraud,
03:50:53PM 15 and that's theft.

03:50:54PM 16 One thing that was remarkable about the closing
03:50:58PM 17 argument we just heard from defense was, Mr. Calfo
03:51:01PM 18 admitted that Count 1 is really the central charge for
03:51:04PM 19 many of the charges in this case, it is the conduct that
03:51:06PM 20 underlies and leads to the other charges. There was
03:51:09PM 21 remarkably little discussion of that. We didn't hear
03:51:12PM 22 anything about Julie Yates, about Carl Lago, about
03:51:16PM 23 Michelle Millsap, about the witnesses at the escrow
03:51:19PM 24 companies, about the practices, about what Mr. Kelley
03:51:21PM 25 actually did, and what PCD did. We heard almost nothing

03:51:25PM 1 about Jason Jerue. We have an attack on Jason Jerue, but
03:51:29PM 2 almost nothing about De Lamb and Amber Murray.

03:51:32PM 3 We heard one technical argument as to why you should
03:51:35PM 4 not find Mr. Kelley guilty on Count 1. It is an argument
03:51:39PM 5 based on a lot of questioning you've heard during the
03:51:41PM 6 trial about escrow instructions and escrow agreements. I
03:51:45PM 7 want to address that, because that argument does not -- it
03:51:49PM 8 is not a basis to find Mr. Kelley not guilty.

03:51:53PM 9 Mr. Calfo looked at, and I would ask you to look at,
03:52:00PM 10 Instruction 18, which is Page 19 in the instructions.
03:52:02PM 11 This is the instruction that defines what stolen property
03:52:06PM 12 is. It says -- And I will read it slowly, but please
03:52:21PM 13 look with me. It says, "The property is stolen if it is
03:52:30PM 14 taken from one having the attributes of an owner with
03:52:34PM 15 intent to deprive him of his rights and benefits in the
03:52:36PM 16 property. The government need not prove who owns the
03:52:39PM 17 stolen property, but it must prove that the property did
03:52:42PM 18 have an owner. It must prove that the defendant did not
03:52:46PM 19 own it, and that he knew he did not."

03:52:49PM 20 And the key here is to look at what happened, and look
03:52:53PM 21 at the timing of it. At the start of the transaction the
03:52:56PM 22 borrowers own the money, it is their money. There is no
03:52:59PM 23 question about that. Even Mr. Kelley's own expert,
03:53:02PM 24 Mr. Savitt, said under his theory title didn't pass to
03:53:06PM 25 Mr. Kelley until the time of disbursement, that is, the

03:53:08PM 1 time of closing. It is originally the borrowers' money.
03:53:13PM 2 And the borrowers hand it to the escrow companies as they
03:53:16PM 3 get ready for the transaction.

03:53:18PM 4 This instruction tells you you need need to worry
03:53:20PM 5 about what impact that has on ownership, whether it is the
03:53:23PM 6 borrowers' or the escrow companies'. It says the
03:53:25PM 7 government need not prove who owns the stolen property,
03:53:28PM 8 but it must prove the property did have an owner. The
03:53:31PM 9 property still has an owner. When the borrower hands it
03:53:34PM 10 to the escrow company it doesn't lose having an owner. It
03:53:37PM 11 still has an owner.

03:53:38PM 12 The one thing that is clear is that owner is not
03:53:41PM 13 Mr. Kelley, it is not Post Closing Department. So the
03:53:43PM 14 property is sitting there before closing, and it has an
03:53:46PM 15 owner.

03:53:47PM 16 Mr. Kelley has gotten himself on those HUD-1s by lying
03:53:52PM 17 to the escrow companies. He has promised that he will
03:53:54PM 18 refund money. That's how he has gotten the business.
03:53:57PM 19 That's why his name is on the HUD-1. But he doesn't
03:54:02PM 20 intend to refund it. He has decided he is going to keep
03:54:05PM 21 it.

03:54:05PM 22 And so when Mr. Kelley takes that property at the time
03:54:08PM 23 of closing, he is taking it from its owner, and he is
03:54:12PM 24 taking it with the intent to deprive that owner of the
03:54:16PM 25 rights and benefits in the property. The central benefit

EXHIBIT I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,) No. CR15-5198RBL
)
vs.) ROUGH DRAFT
)
TROY KELLEY,)
)
Defendant.)

CLOSING ARGUMENTS

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

April 20, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
Arlen Storm
Assistant United States Attorneys
Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

11:08:21AM 1 defendant, in this case Mr. Kelley, engaged in a financial
11:08:24AM 2 transaction involving property that represented the
11:08:26AM 3 proceeds of mail or wire fraud. So because you have to
11:08:31AM 4 show that there was financial transactions involving
11:08:34AM 5 property or proceeds of mail or wire fraud, you first have
11:08:39AM 6 to determine whether there was mail or wire fraud that
11:08:42AM 7 resulted in the proceeds. And that's why there is the
11:08:45AM 8 instruction for finding mail and wire fraud.

11:08:50AM 9 So let's then turn to the mail and wire fraud
11:08:55AM 10 instructions. According to the mail and wire fraud
11:09:03AM 11 instructions, the government needs to show that the
11:09:10AM 12 defendant participated or devised in a scheme to defraud,
11:09:13AM 13 essentially did he lie or make false statements in order
11:09:18AM 14 to get money. Then we have to show that those
11:09:24AM 15 statements -- or facts stated were part of the scheme and
11:09:32AM 16 were material. And then we have to show that the
11:09:36AM 17 defendant acted with the intent to defraud. And then,
11:09:41AM 18 fourth, that the mails or wires were used in furtherance
11:09:43AM 19 of that scheme.

11:09:47AM 20 In this case the scheme to defraud or the false
11:09:58AM 21 statements are the same scheme alleged in Count 1. So if
11:10:01AM 22 you find that Mr. Kelley lied to Fidelity and Old Republic
11:10:06AM 23 in order to get access to those reconveyance fees, then
11:10:12AM 24 you have met the element -- then you have also found the
11:10:14AM 25 element for the mail or wire fraud, because it is the same

11:10:19AM 1 scheme that is being alleged here in this case.

11:10:25AM 2 The materiality element is, again, a similar issue.
11:10:34AM 3 These promises, these statements that Mr. Kelley made to
11:10:37AM 4 Old Republic and Fidelity were material because they were
11:10:41AM 5 very important to those companies, as you heard from those
11:10:45AM 6 employees, and the reason why they chose Post Closing
11:10:48AM 7 Department to place on the settlement agreements and to
11:10:52AM 8 give them the reconveyance fees.

11:10:57AM 9 Moving to the third element, you also know Mr. Kelley
11:11:02AM 10 intended to deceive or cheat Fidelity and Old Republic.
11:11:06AM 11 Because as you saw by the emails, he continued to
11:11:09AM 12 represent, even as he was not refunding, that he was only
11:11:13AM 13 entitled to a flat fee of \$15 in the instance of Fidelity,
11:11:18AM 14 \$20 in the instance of Old Republic. Even when he was not
11:11:24AM 15 doing as he said, he continued to make those
11:11:28AM 16 representations, and shows the intent to cheat.

11:11:32AM 17 Finally, the evidence that Mr. Kelley caused the wires
11:11:37AM 18 and mails to be used in this case, you saw that, for
11:11:42AM 19 instance, Mr. Kelley faxed from Washington state the
11:11:50AM 20 agreement between Post Closing Department and Old Republic
11:11:53AM 21 to Mr. Lago, who worked in California. So that's an
11:11:57AM 22 example of an interstate wire that was used to further the
11:12:03AM 23 scheme.

11:12:07AM 24 Also, you heard testimony from the Post Closing
11:12:10AM 25 Department employees Amber Murray and De Lamb that they

EXHIBIT J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,) No. CR15-5198RBL
)
vs.) ROUGH DRAFT
)
TROY KELLEY,)
)
Defendant.)

CROSS & RECROSS-EXAMINATION OF PAUL SHIPLEY

BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

April 12, 2016

APPEARANCES:

Andrew Friedman
Richard Cohen
Katheryn Frierson
Arlen Storm
Assistant United States Attorneys
Representing the Plaintiff

Angelo Calfo
Patricia Eakes
CALFO HARRIGAN LEYH & EAKES
Representing the Defendant

11:30:03AM 1 largest percentage of its total receipts; is that right?

11:30:06AM 2 A. That's what it says.

11:30:07AM 3 Q. This is a classification code that is used by the
11:30:09AM 4 government for purposes that have nothing to do with
11:30:11AM 5 expenses; isn't that right?

11:30:12AM 6 A. Yes.

11:30:13AM 7 Q. That is what it says right there in your IRS
11:30:16AM 8 regulations or forms, right?

11:30:19AM 9 A. It says they use it for statistics, I believe.

11:30:26AM 10 Q. Now, you also stated that if you have an inactive
11:30:38AM 11 business you are not permitted to take business expenses.
11:30:41AM 12 Is that your testimony?

11:30:42AM 13 A. That is not quite what I said, sir.

11:30:45AM 14 Q. You testified that one of the reasons these expenses
11:30:47AM 15 were no good is because he had no employees, he was
11:30:50AM 16 selling no merchandise, you went on a long list.

11:30:52AM 17 A. There didn't appear to be any active trade or
11:30:56AM 18 business being conducted during those years.

11:30:58AM 19 Q. Does there have to be an active trade or business?

11:31:01AM 20 A. Yes, there does.

11:31:02AM 21 Q. What kind of research did you do into that assertion,
11:31:04AM 22 sir? That is a central part of your testimony.

11:31:06AM 23 A. Well, Code Section 162, and the various court cases
11:31:10AM 24 under it.

11:31:10AM 25 Q. Well, isn't it true that courts have held that where

11:31:18AM 1 there is a suspension of operations it doesn't necessarily
11:31:21AM 2 mean that a business is terminated for purposes of taking
11:31:24AM 3 expenses?

11:31:26AM 4 A. Well, he filed the final return for United National.
11:31:29AM 5 I don't know -- That sounds like a termination of the
11:31:32AM 6 business.

11:31:32AM 7 Q. I understand that is your interpretation, sir. But
11:31:36AM 8 you understand, also, that according to the exhibit I just
11:31:38AM 9 showed you, Blackstone was going to continue on with the
11:31:41AM 10 business of United National, Blackstone its parent
11:31:45AM 11 company. Now, if you could just for a moment assume a
11:31:48AM 12 fact that doesn't fit within your theory, isn't it true
11:31:53AM 13 that there is case law that says the mere suspension of
11:31:56AM 14 operations does not prevent someone from taking business
11:31:59AM 15 expenses?

11:31:59AM 16 A. That could be true. But that does not allow a
11:32:02AM 17 taxpayer to claim personal expenses relating to his
11:32:04AM 18 family, sir.

11:32:05AM 19 MR. CALFO: Your Honor, I am going to ask again
11:32:07AM 20 that we --

11:32:07AM 21 THE COURT: Overruled. But persist.
11:32:11AM 22 By Mr. Calfo:

11:32:11AM 23 Q. If you could stick to the answer -- answer the
11:32:14AM 24 question, sir. You will have an answer to make your
11:32:17AM 25 points at some other time. There is a case called Haft